ABDUL SAMAD MOHD EMBONG & ORS v. PANTAI BAYU INDAH SDN BHD & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
KAMARDIN HASHIM JCA
MOHAMAD ZABIDIN MOHD DIAH JCA
[CIVIL APPEAL NO: Q-01(IM)(NCVC)-381-10-2017]
16 DECEMBER 2019

CIVIL PROCEDURE: *Contempt of court – Committal order – Appeal against – Appeal against decision to commit appellants' counsel (contemnor) – Contemnor himself did not file appeal against committal order and period for doing so lapsed – Whether contemnor allowed to be added as appellant in appeal – Contempt applications made against contemnor personally – Whether null and void – Whether mode of application for contempt of court adopted by applicants correct – Right to appeal – Whether only party affected by order or judgment made had right to appeal – Whether appellants parties to committal proceedings – Whether appellants had independent right to lodge appeal against decision to commit contemnor for contempt of court – Whether appellants had locus standi to appeal – Whether appeal outside purview of s. 67 of Courts of Judicature Act 1964*

CIVIL PROCEDURE: *Committal proceedings – Right to appeal – Appeal against decision to commit appellants' counsel (contemnor) – Contemnor himself did not file appeal against committal order and period for doing so lapsed – Whether contemnor allowed to be added as appellant in appeal – Contempt applications made against contemnor personally – Whether null and void – Whether mode of application for contempt of court adopted by applicants correct – Whether only party affected by order or judgment made had right to appeal – Whether appellants parties to committal proceedings – Whether appellants had independent right to lodge appeal against decision to commit contemnor for contempt of court – Whether appellants had locus standi to appeal – Whether appeal outside purview of s. 67 of Courts of Judicature Act 1964*

This appeal by the appellants was against the decision of the High Court to commit their counsel Ng Kim Ho ('the contemnor') to one day imprisonment and a fine of RM30,000 in default three months imprisonment for contempt of court committed during the course of the trial. Briefly, the facts were that the appellants had commenced civil proceedings against the respondents claiming for several declaratory reliefs. On the third day of hearing, the appellants filed a notice of application to recuse the trial judge from further hearing the case, which was supported by the affidavit of the contemnor. The contemnor averred, among others, that the trial judge was unable to conduct the trial with due fairness and impartiality to the appellants as he had shown bias and prejudice towards him as their counsel. After hearing the recusal

application, the trial judge adjourned the matter for ruling. What transpired after the adjournment was that the contemnor addressed a gathering of persons outside the entrance to the courthouse and repeated some of the allegations contained in his affidavit and his statements were recorded on video and circulated in the social media. Subsequently, the trial judge dismissed the recusal application on grounds, *inter alia*, that it was an abuse of the court process, was contemptuous of the court and wholly without merit. Nevertheless, the trial judge decided to recuse himself. The first, second and third respondents applied for and obtained leave to commit the contemnor to prison for contempt of court. It was averred that the conduct of the contemnor had the effect of interfering, impeding or prejudicing the due administration of justice and was likely to undermine or erode public confidence and respect in the administration of justice and the dignity of the Judiciary of this country. The Judicial Commissioner ('JC') found the contemnor guilty of contempt of court and passed sentence. Thus, the appellants lodged the said appeal against the decision of the JC. There was nothing in the notice, however, to say that the appellants were appealing on behalf of the contemnor. Before the appellants' appeal came up for hearing, the first respondent filed an application (encl. 50) to strike out the appeal on the ground that the appellants did not have an independent right to lodge an appeal against the decision given in the committal proceedings and that the appeal lodged by them was incompetent. The appellants' response to encl. 50 was to file encl. 63 for an order that the contemnor be allowed to become an intervener in this appeal and encl. 65 for, *inter alia*, the notices of application for committal to be declared null and void as it was wrongly filed or instituted against the appellants.

Held (dismissing appeal)

Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) To allow the appellants' order that the contemnor be allowed to intervene and to be added as an appellant in this appeal would be to enable the contemnor to breach the rule that an appeal to this court must be filed within 30 days from the date of the decision appealed against, in this case 30 days from the date of the committal order. The contemnor had not filed any appeal against the committal order and the period for doing so had long lapsed. Further, there was no merit in the appellants' contention that the committal applications were wrongly brought against the contemnor, thus rendering the applications incompetent or null and void. It was incorrect for the appellants to say that the contempt applications were made against them and not against the contemnor personally. The person cited for contempt was the contemnor and not the appellants. (paras 23 & 24)

(2) As for the propriety of the mode of application adopted by the respondents, the respondents were right in bringing them within the pending civil suit and to bring them against the contemnor only and not against the appellants. The appellants were not named as parties to the applications for committal and they were not served with the documents. There was no error in bringing the committal proceedings by way of notices of application in the pending suit as this was expressly permitted by O. 52 r. 3 of the Rules of Court 2012 ('Rules') which requires the applicant to seek leave by filing a notice of application supported by a statement and an affidavit. Therefore, the respondents did not commit any error in making the committal applications in the pending suit and using the title of the pending suit without adding the contemnor's name to the title. (paras 25, 26 & 28)

(3) The contemnor was fully aware of the nature of the applications against him and he was not in any way misled by them. The contemnor knew exactly what he was faced with and the consequences that would follow if he was to be found guilty of contempt and he confronted it head on, taking the bull by the horns so to speak. There was no basis for the contemnor to claim that he took no part in the committal proceedings as the record showed that he responded to the committal applications and actively participated in the proceedings. For all these reasons, the appellants' applications in encls. 63 and 65 were dismissed. (paras 29-31)

(4) The right to appeal is a creature of statute. This court was conferred with 'jurisdiction to hear and determine appeals from any order or judgment of any High Court in any cause of matter' by s. 67 of the Courts of Judicature Act 1964 ('CJA'). By virtue of this provision, a person who intends to appeal must be a party to the cause or matter before the High Court and must be affected by the order or judgment made therein by the High Court. The contemnor offered no explanation as to why he did not appeal against the High Court decision which affected him personally and directly. He could not treat the appellants' appeal as his appeal against the committal order as the appellants were not parties to the committal proceedings. He was the person who was found guilty of contempt of court and not the appellants. There was no provision for a representative appeal. On the facts, the only person who satisfied the threshold requirement to appeal and who had the right to appeal against the decision made in the committal proceedings was the contemnor himself. It was therefore the contemnor who had the *locus standi* to appeal against the committal order and not the appellants. (paras 32, 33 & 35)

(5) The defect in the notice of appeal was incurable. It was fundamental in nature and went to the root of the matter as the persons who lodged the appeal had no right to appeal. This court had no jurisdiction to entertain an appeal brought by strangers who are unaffected by the decision or order of the High Court. That took this appeal outside the purview of s. 67 of the CJA. Further, there was no nexus between the act of contempt which was personal to the contemnor, and the pending suit between the appellants and the respondents. The trial of the suit had not even come to an end. There was nothing to prevent the contemnor from continuing to represent the appellants in the pending suit in spite of the committal order. Thus, this court was constrained to strike out the appellants' appeal for being incompetent. (paras 36, 39 & 43)

Case(s) referred to:
Attorney General & Ors v. Arthur Lee Meng Kuang [1986] 1 LNS 61 SC ***(refd)***
Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1) [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 SC ***(refd)***
Ikebife Ibeneweka & Ors v. Peter Egbuna & Anor [1964] 1 WLR 291 ***(refd)***
PP v. SRN Palaniappan & Ors [1949] 1 LNS 66 HC ***(refd)***
Tradium Sdn Bhd v. Zain Azahari Zainal Abidin & Anor [1996] 2 CLJ 270 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 13, 67
Federal Constitution, arts. 10, 126
Rules of Court 2012, O. 52 rr. 3, 4

Other source(s) referred to:
Malaysian Civil Procedure 2018, Vol II, para C/67/2

For the appellants - Arthur Lee, Dominic Ng Kim Ho, Voon Lee Shan & Tiong Ing Neng; M/s Dominique Ng & Assocs
For the 1st respondent - Mekanda Singh Sandhu; M/s Sandhu & Co Advocs
For the 2nd & 3rd respondents - JC Fong; SLC, Mohd Adzrul Adzlan & Mohamad Muhaimin Zakaria; SLO, Sarawak

[Editor's note: For the High Court judgment, please see Abdul Samad Mohd Embong & Ors v. Pantai Bayu Indah Sdn Bhd & Ors And Another Application [2018] 9 CLJ 517 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JCA:

[1] This appeal by the appellants, who were the plaintiffs in the court below, was against the decision of the High Court at Miri, Sarawak to commit their counsel Ng Kim Ho (also known as Dominic Ng Kim Ho) to one-day imprisonment and a fine of RM30,000 in default three months imprisonment for contempt of court committed during the course of the trial. We shall refer to Ng Kim Ho a.k.a. Dominic Ng Kim Ho as the contemnor.

[2] The facts giving rise to this appeal are as follows. On 28 May 2014, the appellants commenced civil proceedings against the respondents (defendants in the court below) claiming for several declaratory reliefs, including a declaration that they are the rightful owners and/or otherwise have acquired native customary rights over a large area of land described in para. 4 of their statement of claim. The claim was disputed by the respondents.

[3] On the third day of hearing, the appellants filed a notice of application to recuse the learned trial judge from further hearing the case. Prior to the recusal application, the appellants had amassed a 1000 strong signature petition to the Chief Judge of Sabah and Sarawak against the learned judge and following that, the appellants received a reply letter from the Special Officer to the Chief Judge which stated:

> 2. After referring your said letter to the Right Honourable Chief Judge of Sabah and Sarawak (CJSS), kindly be informed that you are to first file an application before the judge for recusal.

[4] The appellants' application for recusal was supported by the affidavit of the contemnor. In the affidavit, the contemnor averred, amongst others, that the learned judge was unable to conduct the trial with due fairness and impartiality to the appellants as he had shown bias and prejudice towards him as their counsel not only in the ongoing trial, but also in two other trials.

[5] Having regard to the *quasi*-criminal nature of the order made by the High Court and the issues raised by the parties, it is appropriate, we think, for us to reproduce the entire paras. 4 to 21 of the contemnor's affidavit in support:

> 4. I say that this action is currently in the process of trial set for the 1st to the 10th of March 2017. And that 3 days of the trial, from 1st to the 3rd March, have already been conducted.
>
> 5. I say that we have reached a stage where the continuation of this trial before the same Judge will surely jeopardise the fair result or outcome of the case as Yang Arif Lee has shown in various situations narrated below that he is unable to conduct the trial with due fairness and impartiality towards the parties and counsels, specifically towards the plaintiffs and their counsel.
>
> 6. I say that Yang Arif Lee has constantly or often disallowed and/or brushed off any questions or objections raised by me without proper consideration and, on the contrary, has constantly allowed for the defendants' objections even where they are unwarranted, even to the point at several instances, of shouting at me and scolding me "for wasting court's time"! Unfortunately all of the instances where unwarranted such comments were made by Yang Arif have not been recorded in the Notes of Proceedings but other words said by my side or that of my witnesses, have been taken, sometimes in the wrong context and recorded.

7. On all occasions where I have attempted to conduct the rightful reexamination of my witnesses, I have been objected to by the Defendants' counsels one after the other and Yang Arif has made no attempt to stop them but have actually or indirectly by his conduct and partiality encouraged them to continue interrupting my reexamination by constantly siding with them and/or loudly scolding or castigating me for all and every infraction, imagined or real. In doing so, Yang Arif has shown his biasness against me and has thereby obstructed me from carrying out my professional duty as an advocate for my clients.

8. I say this is not the first time I have been forced to endure such biased treatment from Yang Arif Lee! I say that I have two other recent trials before Yang Arif Lee, namely the case of *Teknojaya Construction Sdn Bhd v. Telliana Plantations Sdn Bhd* [Miri-22-13/6-2013] and the case of *Ali Jeman v. Indranika Jaya Sdn Bhd* [KCH-22-71/8-2013]. The same treatment was seemingly directed only at me but not at the opposing counsels regardless of who they were. It would seem that Yang Arif Lee has harboured and/or is harbouring a very personal grudge with me and would find every chance and excuse to chastise me or find fault with me, even in open court.

9. I say that Yang Arif Lee has a strong prejudice against me! Which has started ever since the trial of *Teknojaya* and followed by the next trial in *Ali Jeman* and now this trial. Yang Arif Lee has similarly shouted and castigated me loudly almost every day of the 2 trials for all reasons or excuses, in open court. This is but a continuation of that behaviour which I do believe is quite verbally abusive, most intimidating and very demoralising.

10. I say that Yang Arif Lee has already ruled against me in the *Teknojaya* case by choosing to believe in documents which have been proven to have been concocted well after the fact and even admitted by the Plaintiff! And my client has blamed me for that loss which he said was because of Yang Arif Lee's personal grudge against me! While I am still the counsel on record, he has required me to take on an additional counsel to assist in the Appeal. A copy of the 2 Appeals that I have lodged for the *Teknojaya* case arising from the trial are now shown to me and exhibited here marked as N1 and N2.

11. Despite the Appeals, Yang Arif Lee has ruled against my Application for a Stay of Execution, thus necessitating me to fight what is a wasteful Taxation of Damages Hearing. And to top the insult, Yang Arif Lee has even ruled for the costs to be paid forthwith as if I was personally at fault, and when such a ruling was not normally granted and not warranted in the circumstances of the case. My client thereafter was put into more unnecessary trouble when the Plaintiff's counsel took predatory steps to attack my client by giving me an exceedingly short notice to pay up the relatively small amount of RM4,000 by Monday and serving it with a threat to Wind Up the Defendant Company via a letter faxed on the previous Friday afternoon! Thus requiring us to act fast and in

unnecessary haste to make the payment, within a matter of just hours! To avoid the real and ominous threat of an unwarranted winding up of a big company which has never failed to pay up its dues on time, and which had already paid the plaintiff some RM500,000 for a faulty Fertiliser Store which had totally collapsed within 1 year of its construction! However when it came to their turn to issue us receipt for what was demanded and required to be paid almost instantly, even a month later the Plaintiff had failed to do so! A copy of the Plaintiffs' letter dated 13.01.17 and our letters dated 16 Jan 2017 and 20 Feb 2017 dated 13.01.17 and our letters dated 16 Jan 2017 and 20 Feb 2017 are now shown to me and exhibited here and marked N3, N4 and N5.

12. Yang Arif Lee has also ruled against me in the *Ali Jeman* case in Setting Aside the Judgment in Default entered against Salisan, and despite knowing of my protest and my client's appeal to the Court of Appeal, Yang Arif Lee has chosen to steamroll ahead with the resumption of the trial by setting it at 24 to 26 Jan, continuing on 6 Feb 17. The Court of Appeal as a result of our letter dated 30 Nov 2016 for an early date had already set the earliest available date of 14 Feb 2017, but Yang Arif Lee, instead of taking into consideration the early Appeal date, had insisted that we seek an even earlier Appeal date, and to be heard in KL! Knowing that my client was very poor and unable to pay for such a KL trip and hearing. In the end by his insistence, Yang Arif Lee had made the appeal academic and forced its withdrawal. A copy of the Notice of Appeal dated 4 Oct 2016, our letter seeking an earlier date dated 30 Nov 2016, the letter of inability to afford an earlier dated 3 Jan 2017 and the Notice of Discontinuance are now shown to me and exhibited here marked as N6, N7, N8 and N9.

13. Now in the current trial, in just 3 days Yang Arif Lee has shown his very clear intentions to continue with his personal attacks and verbal abuses of me and which involves shouting at and/or scolding me in front of my clients in open court. I do consider these attacks and verbal abuses as deliberate and being directed at denigrating my personal competency as a qualified, professional and experienced advocate of the High Court of Sabah and Sarawak.

14. In a specific incident on 2nd March 2017 when I raised my objections to the use of the Map D1 by the 2nd and 3rd Defendants, Yang Arif Lee has loudly and unreasonably shouted at me for wasting court's time and for not checking my documents beforehand, when nothing could be further from the truth and the said document being only tendered the day before and under the guise of being merely an enlargement of Pg 40 of DJBOD! However Yang Arif Lee's comments were not recorded while mine and Md Adzrul were. [Pls refer NOP Pg 27, lines 12 to 23].

15. Actually that map was tendered way out of time for discovery, and by right would have been objected to in the first place! I have only refrained from doing that because I took the 2nd and 3rd Defendants' counsel at his word when he said that "this is an enlargement of the map at page 40" which can only mean an enlargement of the entire map! [NOP Pg 4 Lines 3 to 6]. In reality D1 is only an enlargement of a small portion of the map at page 40, and which was outside of the claim of the Plaintiffs against the 1st, 2nd and 3rd and 4th Defendants, but had attempted to pass it off as the whole thing! And most unreasonably, when I raised a rightful objection to that, I was scolded and chastised by Yang Arif Lee as if I was the one at fault!

16. I therefore had to come back in the afternoon of the same day of the 2nd March to put on record my objection to Map D1, and which was accepted by the counsel for the 2nd and 3rd Defendant [NOP Pg 39, Lines 1 to 12].

17. In yet another incident, during the cross of PW3 by Mr Victor Wong for the 4th Defendant, Mr Wong had continued to insinuate and insist that the witness was a Plaintiff and/or Claimant when he not a Plaintiff and was not listed in the List of Claimants as contained in the Further and Better Particulars. When I raised an objection that he should not be so addressed and asked questions as to the recovery of the land, on ground of irrelevancy, I was shouted down by Yang Arif Lee and challenged with many verbal challenges which again were unfortunately not recorded in the NOP. [Pls see NOP Pg 63 lines 11 to 12].

18. And finally in the Re of PW3, when I was asking a legitimate Re Exam question, it was again strenuously objected to by the Defendants' counsel. And when I tried to justify my Re as I should be allowed to, Yang Arif Lee has again shouted at me and castigated me thus causing me to lose focus and to become blur from the constant interruptions and frequent Judicial rebukes! I therefore raised my objections to such an unfair treatment and I recorded my protest therein and which were recorded in the NOP. However the most unfair remarks of Yang Arif Lee were again not recorded. [see NOP Pg 65 and 66].

19. I am now faced with a possible contempt of court proceedings arising from the final comments and protest which I have rightfully raised against the defendants and Yang Arif Lee. If I were to fearlessly persist in the advocating the rights of the Plaintiffs as is my duty, I fear that I would eventually and inevitably end up being found in contempt of court and put in jail by Yang Arif Lee!

20. I therefore say that Yang Arif Lee has failed to preside over the case without prejudice and with impartiality! He has allowed his personal biasness and/or prejudice to get in the way of what is supposed to be a course of justice!

21. I humbly pray that Yang Arif Lee will be recused and be stopped from proceeding with the trial of this action, without any further delay.

[6] From the tenor and language of the affidavit, which is punctuated by 19 exclamation marks, there was total and complete disregard for the dignity of the court by an officer of the court, of all persons. There can be no argument that the contemnor's tirade against the learned judge has a tendency to undermine confidence in the basic function of a judge and "excite in the minds of the people a general dissatisfaction against all judicial determination": *Public Prosecutor v. S.R.N. Palaniappan & 2 Ors* [1949] 1 LNS 66; [1949] 15 MLJ 246.

[7] The need to protect the dignity and integrity of the court is recognised by art. 126 of the Federal Constitution and also by s. 13 of the Courts of Judicature Act 1964. A proper balance has to be struck between the right of speech and expression as provided in art. 10 of the Federal Constitution and the need to protect the dignity and integrity of the superior courts in the interest of maintaining public confidence in the Judiciary: *AG v. Arthur Lee Meng Kuang* [1986] 1 LNS 61; [1987] 1 MLJ 206 per Mohamed Azmi SCJ delivering the judgment of the Supreme Court.

[8] After hearing the recusal application, which was heard in chambers on the same date, the learned judge adjourned the matter for ruling. What transpired after the adjournment was that the contemnor addressed a gathering of persons outside the entrance to the courthouse and repeated some of the allegations contained in his affidavit and his statements were recorded on video and circulated in the social media. There were two videos and we reproduce below their English translations:

First video

This is my filed (court conversation/court hearing) that I went to do earlier. I worked for it all the way to 3 a.m. till it was finished. Upon 8 a.m. it was finally filed. I gave him reasons as to why I think he's unfit to be the judge with this ongoing case – because as I've said, this is not the first time I've faced him as a lawyer and he, as a judge. I've said I had two cases before; one in Miri, another in Kuching.

Yet, he still behaved in the same way which he behaved in this hearing. Acting as sort of "old history", it is as though he has some sort of personal grudge against me. Okay? On top of what reason? I don't know. I even recorded here, I even gave a document, as well.

Okay, they disagree that these two cases are not related with this case. It's correct! But, to prove someone…a judge, no, someone like him to be bias. There is a real danger of bias. There's … errr … errrr … errrr … real danger of bias. They are on the same side, the same side. A real danger.

Actually, it's not definite for me to prove that he's biased. However, as long as it's a real danger, there's a high chance that he may be biased.

Okay? I must bring forward the two cases from the past that was faced before him. Okay? They said it was not related, I said it is related. To prove the judge's demeanour and his attitude.

A Everybody debated earlier, through their mouth. He was angry at me, and yes, I am angry. I'm angry because of the maps that was presented by the Government. Because from day 1, he said this map I will enlarge it. One map which is clear and concise, I will enlarge it – so it'd be easier for you to look. He said he will enlarge it, but, I didn't know that the map that he has enlarged was NOT the whole map of which we've claimed. He
B only enlarged a few areas, areas that are far away from which we've claimed.

Okay? Of course I felt I've been hit like … I don't know how to say … as though I've been fooled by him. Played by. For us as a lawyer, okay – the things said must be able to be used, not simply to be said as you
C like. That's why I was very angry at him. Inside, when I was still speaking, the things he said and the meaning is different from past days. I simply cannot believe it anymore. I can't! What can I believe? Is this the action of a Government lawyer? This mustn't be. Thus mustn't be. Okay?

But, he said I am still not objecting. I didn't make objection because
D he…gave me the wrong information that is completely wrong. Okay? I was played by him. This should not happen. It's using tricks in court hearing. If were I've known during the time, I would've told the judge; "Oh Your Honour, this enlargement is only a few parts of it only". I would've read that.

E What reasoning? Because now it has already been stated. He cannot send in new documents anymore. The duration has ended since 12 years ago – now, he wanted to send it. I, myself also did a huge map called Map Y. I did the map up to this huge because they need me to do it big and clear, I did it at 100%. I gave him early, got shot again and again. Got into noises (arguments or rejections?) over and over again that my map
F wasn't clear enough or my map that was sent is not similar to his. He … Whatever reasoning that they may bash on me.

Second video

But, lastly, he gets to read what we did carefully. We claimed. But, this document that he tried to present is a way for him to cheat or trick me.
G And now, he's using it in the hearing. Okay? To confuse our witness. That's why I'm so angry at him.

Okay…so, being angry is angry but I still have to do my job. And at the same time, earlier, the honourable judge – after hearing the two parties, as you would know it was 3 against 1. Like usual, 3 against 1.

H Not included the judge, not yet. Okay – since early this morning you observed, there's a lot of differences right? Saw it? Is this the correct and expected of his attitude? Not just now, first day too. It's serious! The attitude of each lawyer.

I'm not some sort of a "white-bean" lawyer. Is my licence not qualified?
I Am I not enough experience or was my professionalism not up to par? However, I spoke to him in my affidavit. It was like … I was humiliated in front of my junior lawyers portraying that I was incompetent!

Not enough of professionalism as a lawyer. This is what I think. It's so easy for him to bash me. So, I said … now we have all lost our belief in him in being a fair and just judge. To do/serve justice and carry on for this case. Okay, I'm sorry. I said I'm sorry, okay?

But, this has already happened … so, earlier – he asked me …"You have a petition to be sent to the Sarawak's Head of Judge." I said, yes, that's correct. Petition has already reached there. Okay, which we will send to him by today. But, I've received information whereby he is not in Kuching. So … when he will read the petition that we've made, I do not know.

Strange Woman: Can it be sent through E-mail?

Yes, through e-mail, or fax, or whatever can. But, to reach over there … will he read it or not, is he able to make it in time to read the contents is completely out of my certainty. So, earlier they were in an unanimous accepted thought that now – a judge has the power to make decision/next course of action/next course of business. One does not need to wait for higher orders of Sarawak's Head of Judge.

Okay? But as I said, the petition is on its way.

[9] So, instead of waiting for the learned judge's ruling on the recusal application, the contemnor saw it fit to ridicule and to further scandalise the learned judge, this time publicly.

[10] On 9 March 2017, the learned judge dismissed the recusal application on the grounds, *inter alia*, that it was an abuse of the court process, was contemptuous of the court and wholly without merit. Nevertheless, the learned judge decided to recuse himself. The conduct of the trial was then taken over by the learned Judicial Commissioner ("JC").

[11] On 6 April 2017, the first respondent (first defendant) applied *ex parte* for leave to commit the contemnor to prison for contempt of court. Upon obtaining leave, the first respondent filed a notice of application for committal against the contemnor for his several contempt of court relying, *inter alia*, on the averments made by the contemnor in his affidavit in the recusal application.

[12] The following day on 7 April 2017, the second and third respondents (second and third defendants) also applied for and obtained leave to commit the contemnor to prison for contempt of court. In para. 9 of the affidavit affirmed by the State Legal Officer on 29 March 2017, it was averred that the conduct of the contemnor had the effect of interfering, impeding or prejudicing the due administration of justice and is likely to undermine or erode public confidence and respect in the administration of justice and the dignity of the Judiciary in this country.

[13] On 9 August 2017, the learned JC found the contemnor guilty of contempt of court and passed the sentence we mentioned at the start of this judgment. These were, *inter alia*, his reasons:

(i) There was no evidence that the learned judge was unfair to the contemnor's clients which might justify his clients' decision to make the recusal application, as can be seen for example from para. [14] of the learned judge's ruling where he made the following remarks:

> [14] Mr. Ng has a selective memory. He only submitted on the occasions that I ruled against him. What about the incidents in this very case when I ruled in favour of the Plaintiffs and/or him and rejected the 1st Defendant's application to strike out his client's case twice, firstly by way of a striking out application and secondly when the Plaintiffs failed to comply with an "unless order". If indeed I have a personal grudge against Mr Ng as alleged, I would have allowed either 1 of these 2 striking out applications, but I exercised my discretion based on the law and evidence in favour of Mr Ng or the Plaintiffs otherwise his client's case against the 1st Defendant would have been struck out.;

(ii) that the allegations contained in the contemnor's affidavit in support were not made by the appellants but the allegations emanated from the contemnor himself and were personal to him;

(iii) that the contemnor condoned his clients' action in circulating in the social media the statements that he made to them and to the public at large which had the effect of ridiculing and scandalising the learned judge;

(iv) that the learned judge had found that the recusal application did not satisfy the test of "real danger of bias", that it was an abuse of process and wholly without merit, and there was no appeal filed by the appellants;

(v) that the allegations in the affidavit were very serious and likely to erode public confidence and respect in the administration of justice and were clearly calculated to interfere with the course of justice in order to remove the judge.

[14] On 27 September 2017, the appellants lodged an appeal against the decision of the learned JC given in the committal proceedings. The appellants' notice of appeal reads:

> TAKE NOTICE that the above named Appellants/Plaintiffs being dissatisfied with the Decisions of the Judicial Commissioner, Yang Arif Tuan Dean Wayne Daly delivered at Miri, Sarawak on 9th August 2017 and the Sentence on 30th August 2017, do hereby appeal to the Court of Appeal against the whole of both the said Decisions that allowed the

Respondents/1st 2nd and 3rd Defendants' Application for Committal in their respective applications (Encls. 229 and 231) against the counsel for the Appellants/Plaintiffs, Ng Kim Ho (also known as Dominique Ng Kim Ho), with the sentences of imprisonment term of one (1) day and a fine of RM30,000.

[This Appeal is filed in respect of the Encls. 229 (by the 1st Defendant) and 231 (by the 2nd and 3rd Defendants (the Respondents) which were heard simultaneously and/or jointly and against the decision and sentence given as a result of the said Applications filed by the Respondents]

[15] It was a notice of appeal filed on behalf of the appellants by the law firm of Dominic Ng & Associates, the firm in which the contemnor practices law. There is nothing in the notice however to say that the appellants were appealing on behalf of the contemnor.

[16] What is clear is that the contemnor himself did not appeal against the decision, which must be taken to mean that he accepted the High Court's decision to find him guilty of contempt of court. Nor did he, when filing the notice of appeal, add his name as an appellant even though he could have done so. Anyway, by the time the present appeal was heard, the time for the contemnor to file an appeal against the committal order had long lapsed and no application for extension of time was made.

[17] The grounds of appeal that the contemnor filed on behalf of the appellants subsequent to the filing of the notice of appeal were as follows:

(i) That the learned JC erred in law and fact in allowing the applications for committal when there were no reasonable grounds for doing so as the contemnor was merely carrying out their instructions.

(ii) That the learned JC erred in finding that the contemnor was guilty of contempt of court as he never published, made any statements and/or publications that might scandalise the court and or impede or prejudice or interfere with the course of justice and/or erode public confidence in the administration of justice as the contemnor was at all relevant times performing his duty in updating and disclosing to them what happened to the recusal applications which was held in chambers and which they were anxious to know.

(ii) That the learned JC erred in finding that the contemnor did not have their instruction to file the affidavit in support of their applications for recusal of the learned judge or that the allegations were not for the appellants, when in fact the recusal applications were clearly on their instruction.

[18] The grounds are clearly directed at the High Court's finding that the contemnor was guilty of contempt of court, which they allege was wrongly made by the learned JC. None of the grounds has anything to do with the decision of the High Court on any matter relating to the appellants' suit against the respondents. In fact the contemnor did not, in his affidavit in support of the recusal application, aver that the allegations that he made against the learned judge were on the specific instruction of the appellants.

[19] Before the appellants' appeal came up for hearing, the first respondent filed an application *vide* encl. 50 dated 23 May 2019 to strike out the appeal on the ground that the appellants did not have an independent right to lodge an appeal against the decision given in the committal proceedings and that the appeal lodged by them was incompetent for the following reasons:

(a) the appeal originated from committal proceedings brought against the contemnor who acted as an advocate for the appellants in the proceedings under High Court Suit No. MYY-21NCvC-5/6-2014;

(b) the notices of application for committal were only filed against and served on the contemnor;

(c) the appellants were not parties and did not intervene in the committal proceedings before the High Court;

(d) the contemnor was found guilty of the charge of contempt and subsequently, upon further hearing, sentenced to imprisonment of one day and a fine of RM30,000, or in default, three months imprisonment and he was the only person affected and aggrieved by the decision made in the committal proceedings;

(e) the appeal against the said decision was not filed by the contemnor but was filed by the appellants.

[20] The appellants' response to encl. 50 was to file encl. 63 and encl. 65 both dated 31 May 2019. Enclosure 63 was for an order that the contemnor be allowed to become an intervener in this appeal. The application was supported by the affidavit of the contemnor affirmed on 29 May 2019 setting out the following grounds in support:

(a) that the contempt applications were made against the appellants and not against him personally;

(b) that the contempt applications ought to have been brought against him as the person cited for contempt;

(c) consequently, the contempt applications and the order for his committal were incompetent or null and void; and

(d) that in the premises, he ought to be allowed to intervene as his rights and liberties were directly affected by the contempt applications and order for committal. A

[21] As for encl. 65, it was an application for the following orders:

(a) leave to amend the name of the appellants to add "Ng Kim Ho (WN. KP. 610404-13-5197) (as the contemnor and advocate for the appellants to the title to the appeal); B

(b) to add two additional grounds namely (i) Ground 14 that the two notices of application for committal (encl. 229 and encl. 231) were wrongly filed or instituted and/or intituled as against the plaintiffs/appellants, (ii) Ground 15 that there was no contemnor or otherwise the two notices of application for committal (encl. 229 and encl. 231) were null and void, invalid and/or were otherwise incomplete or incompetent. C

[22] The two applications were related and intertwined and so we have considered them together. Both applications must fail if encl. 50 is allowed, but for completeness, we shall deal with the two applications first, followed by encl. 50. D

[23] First, the appellants' application for an order that the contemnor be allowed to intervene and to be added as an appellant in this appeal. Our short answer to the application is, and we agree with Dato Sri JC Fong on this point, that to allow the application would be to enable the contemnor to breach the rule that an appeal to this court must be filed within 30 days from the date of the decision appealed against, in this case, 30 days from the date of the committal order. As we mentioned, the contemnor did not file any appeal against the committal order and the period for doing so has long lapsed. E F

[24] As for encl. 65, we must say at the outset that there is no merit in the appellants' contention that the committal applications were wrongly brought against the contemnor, thus rendering the applications incompetent or null and void. First of all, it is incorrect for the appellants to say that the contempt applications were made against them and not against the contemnor personally. The person cited for contempt was the contemnor and not the appellants. G

[25] As for the propriety of the mode of application adopted by the respondents, the respondents were right in our view in bringing them within the pending civil suit, ie, Suit No. MYY-21 NcvC-5/4-2014 and to bring them against the contemnor only and not against the appellants. The appellants were not named as parties to the applications for committal and they were not served with the documents. H I

[26] We are unable to accept Mr Arthur Lee's argument that there was error in bringing the committal proceedings by way of notices of application in the pending suit as this is expressly permitted by O. 52 r. 3 of the Rules of Court 2012 ("the Rules") which requires the applicant to seek leave by filing a notice of application supported by a statement and an affidavit. For ease of reference, we reproduce O. 52 rr. 3 and 4 of the Rules:

> **Order 52 rule 3**
>
> 3(1) No application to a Court for an order of committal against any person may be made unless leave to make such application has been granted in accordance with this rule.
>
> (2) An application for such leave must be made *ex parte* to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.
>
> **Order 52 rule 4**
>
> 4(1) When leave has been granted under rule 3 to apply for an order of committal, the application for the order must be made by notice of application to the Court, and, unless the Court granting leave has otherwise directed, there must be at least eight clear days between the service of the notice of application and the day named therein for the hearing.
>
> (2) Unless within fourteen days after such leave was granted the notice of application filed, the leave shall lapse.
>
> (3) Subject to paragraph (4), the notice, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 3 and the order granting such leave, must be served personally on the person sought to be committed.
>
> (4) Without prejudice to the powers of the Court or Judge under Order 62, rule 5, the Court or Judge may dispense with service of the notice under this rule if it or he thinks it just to do so.

[27] In *Malaysian Civil Procedure 2018* vol. 1 under the heading "Editorial Introduction" this is what the learned authors have to say:

> RC 2012 Order 32 is a provision dealing with the procedure to be followed when making interlocutory application in a pending cause or matter, which is to be heard in chambers.

[28] It is clear therefore that the respondents did not commit any error in making the committal applications in the pending suit and using the title of the pending suit without adding the contemnor's name to the title.

[29] More importantly, the contemnor was fully aware of the nature of the applications against him and he was not in any way misled by them. In fact, in his affidavit in opposition to the applications, the contemnor affirmed as follows:

> 3. I humbly crave leave to refer to the 1st Defendant's Notice of Application for my Committal to Prison …
>
> 37. And. If by doing all that, I am still capable of being held in contempt of court and be liable to be committed to prison as this application is trying to apply for them, I will gladly go to prison.

[30] This is clear evidence that the contemnor knew exactly what he was faced with and the consequences that would follow if he was to be found guilty of contempt and he confronted it head-on, taking the bull by the horns so to speak. We find no basis for the contemnor to claim that he took no part in the committal proceedings as the record shows that he responded to the committal applications and actively participated in the proceedings. In fact, he submitted in mitigation before sentencing.

[31] For all these reasons, the appellants' applications in encl. 63 and encl. 65 are dismissed. We shall now deal with encl. 50, which is the first respondent's application to strike out the appeal. The question for our determination was whether the appellants who were not parties to the committal proceedings against the contemnor and who did not intervene in the proceedings have an independent right to appeal against the decision of the High Court making the order of committal against the contemnor.

[32] The right to appeal is a creature of statute. This court is conferred with "the jurisdiction to hear and determine appeals from any order or judgment of any High Court in any cause or matter" by s. 67 of the Courts of Judicature Act 1964 ("the CJA"). By virtue of this provision, a person who intends to appeal must be a party to the cause or matter before the High Court and must be affected by the order or judgment made therein by the High Court: See *Malaysian Civil Procedure 2018,* vol. II, para. C/67/2.

[33] The contemnor offered no explanation as to why he did not appeal against the High Court decision which affected him personally and directly. He cannot treat the appellants' appeal as his appeal against the committal order as the appellants were not parties to the committal proceedings. He was the person who was found guilty of contempt of court and not the appellants. There is no provision for a representative appeal.

[34] In *Tradium Sdn Bhd v. Zain Azahari Zainal* [1996] 2 CLJ 270 Gopal Sri Ram JCA (as he then was) delivering the unanimous decision of this court said at p. 278:

A plaintiff in an action or an applicant in other originating proceeding is entitled to pursue his suit or proceeding against any party chosen by him and cannot be compelled to join as parties he has omitted from impleading: *Selvamary v. G Rethinasamy* [1991] 1 MLJ 156. But any person who may be aggrieved by the decision of the court may intervene and apply to be added as a defendant or respondent. It is then for the Judge in the exercise of his discretion to decide whether or not to allow such course.

The applicant in this instant case having elected to confine himself to the limited right granted under the Rules cannot claim to have an independent right of appeal.

[35] We agree with Mr Mekanda Singh Sandhu for the first respondent that on the facts, the only person who satisfies the threshold requirement to appeal and who has the right of appeal against the decision made in the committal proceedings is the contemnor himself. It is therefore the contemnor who has the *locus standi* to appeal against the committal order and not the appellants.

[36] We accept the respondents' argument that the defect in the notice of appeal is incurable. It is fundamental in nature and goes to the root of the matter as the persons who lodged the appeal have no right of appeal. This court has no jurisdiction to entertain an appeal brought by strangers who are unaffected by the decision or order of the High Court. That takes this appeal outside the purview of s. 67 of the CJA.

[37] One way in which the appellants can claim to be affected by the decision of the High Court will be where the High Court has made a decision on the merits of their claim against the respondents in the pending suit, but not its decision against the contemnor in the committal proceedings, which only affected the contemnor and the contemnor alone.

[38] The argument cannot be stretched too far by saying that since the contemnor was acting as the appellants' counsel when he was found guilty of contempt of court in the pending suit, the appellants by extension are also affected by the decision within the meaning of s. 67 of the CJA.

[39] In the first place, there is no nexus between the act of contempt, which is personal to the contemnor, and the pending suit between the appellants and the respondents. The trial of the suit has not even come to an end. In any event, there is nothing to prevent the contemnor from continuing to represent the appellants in the pending suit in spite of the committal order. Moreover, the learned judge had recused himself from further hearing the suit, which is now heard before another judge.

[40] For the second and third respondents, Dato Sri JC Fong submitted that the contemnor must not be allowed to fight the appeal behind the hedge, relying on the Supreme Court case of *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 where at p. 88 Gun Chit Tuan SCJ cited with approval the following passage in the judgment of Viscount Radcliffe in *Ikebife Ibeneweka & Ors v. Peter Egbuna & Anor* [1964] 1 WLR 291 at p. 226:

> However that may be, there has never been any unqualified rule of practice which forbids the making of a declaration even when some persons interested in the subject matter was not before the court. See *London Passenger Transport Board v. Mascrop* ("except in very special circumstances"), *New York Life Assurance v. Public Trustee.* Whereas here, the defendants have decided to make themselves the champion of the rights of those not represented and have fought the case on that basis, and where, as here, the trial judge takes the view that the interested parties are in reality fighting the suit, so to say, from behind the hedge, there is, in their Lordships' opinion, no principle of law which disentitled the same judge from disposing the case by making a declaration of right in the plaintiffs' favour.

[41] In the context of the present appeal, the interested party who is in reality fighting the appeal from behind the hedge is the contemnor. We agree with Dato Sri JC Fong that here the contemnor was allowing his clients, the appellants to prosecute the appeal against the High Court decision at his behest.

[42] It is obvious that the contemnor wanted the appellants instead of himself to appeal against the decision of the High Court, although the decision affected him personally, being the person found guilty of contempt of court. Having taken that position, the contemnor must now be bound by whatever decision that this court gives against the actual parties who filed the present appeal, in this case the appellants.

[43] For all the reasons aforesaid, we are constrained to strike out the appellants' appeal for being incompetent. Accordingly, we make an order in terms of prayers 1 and 2 of encl. 50. In view of our decision on encls. 50, 63 and 65, we do not find it necessary to deal with the merits of the appeal.

[44] Even if we were to deal with the merits of the appeal, we would still be inclined to dismiss the appeal and affirm the learned JC's decision. On the evidence before him and for the reasons he had given, we are of the view that the learned JC was right in finding the contemnor guilty of contempt of court. We find no compelling reason to disagree with him.